**NANCY SIMON SP SIMON** A

**v.**

**PENINSULAR PARK SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S3-22-520-1998]
22 JANUARY 2008

***DAMAGES:*** *Assessment - Sale and Purchase agreement - Failure of defendant to deliver vacant possession - Loss suffered by plaintiff - Whether plaintiff entitled to refund of monies paid as part payment towards purchase price - Damages of RM324,814 awarded - Specific Relief Act 1950, s. 18* C

The plaintiff filed an action against the defendant for the specific performance of a sale and purchase agreement ('the agreement') entered D into between the plaintiff (as purchaser) and the defendant (as vendor). Pursuant to the agreement, the plaintiff paid RM75,186 towards the purchase of the bungalow lot (lot 127); the full purchase price being RM150,372. The defendant/developer failed to deliver vacant possession of the lot within the time frame as prescribed in the sale and purchase E agreement. Judgment in favour of the plaintiff (on the issue of liability) was entered on 18 March 2005. However, based on the peculiarity of the facts, the court did not decree specific performance; instead, invoked s. 18(2) of the Specific Relief Act 1950 and awarded the plaintiff damages *in lieu* of specific performance. Pursuant to s. 18(4) of the F Specific Relief Act 1950, it was directed by the judge that damages be assessed by the court.

**Held (awarding damages to plaintiff):**

**(1)** As the purchase price of Lot 127 was RM150,372, the loss G suffered by the plaintiff was the difference between the market value of the property as at 19 March 2005 (that was, RM400,000) and the purchase price (that was RM150,372). The difference was RM249,628. Therefore, an order was made that the defendant pay the plaintiff the sum of RM249,628 as damages/compensation. H Further, the plaintiff was entitled to a refund of RM75,186 which the plaintiff pursuant to the sale and purchase agreement had paid the defendant as part payment towards the purchase price. The rational was this: the plaintiffs paid RM75,186 for something they never got, and hence must be refunded this amount. Thus, the total amount of damages awarded to the plaintiff was RM324,814. (paras I 8, 9, 10 & 12)

*[Damages of RM324,814 awarded with costs and interest at 8% per annum with effect from 18 March 2005.]*

**Case(s) referred to:**
*Central Malaysia Development Co Ltd v. Chin Pak Chin [1967] 1 LNS 15 HC* ***(refd)***

**Legislation referred to:**
Specific Relief Act 1950, s. 18(2), (4)

*For the plaintiff - Conrad Young; M/s Sivananthan*
*For the defendant - Dennis Appaduray; M/s Dennis Nik & Wong*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Hishamudin Mohd Yunus J:**

**[1]** This is action by the plaintiff against the defendant for the specific performance of a sale and purchase agreement ('the agreement') entered into between the plaintiff (as purchaser) and the defendant (as vendor). Pursuant to the agreement, the plaintiff paid RM75,186 towards the purchase of the bungalow lot (lot 127); the full purchase price being RM150,372. The defendant/developer failed to deliver vacant possession of the lot within the time frame as prescribed in the sale and purchase agreement.

**[2]** By consent of both parties, the trial proceeded first on the issue of liability only. At the conclusion of the trial on the issue of liability, I found for the plaintiff as I was satisfied that the defendant had breached the sale and purchase agreement by failing to complete the development project and to deliver to the plaintiff the bungalow lot that she had purchased. Judgment in favour of the plaintiff (on the issue of liability) was entered on 18 March 2005. However, based on the peculiarity of the facts, I did not decree specific performance: instead, invoking s. 18(2) of the Specific Relief Act 1950, I awarded the plaintiff damages *in lieu* of specific performance. Pursuant to s. 18(4) of the Specific Relief Act I directed that damages be assessed by the court.

**[3]** On 22 July 2005, at the commencement of the hearing for the assessment of damages, by consent of parties, I made an order that the material date for the purpose of the valuation of lot 127, for the purposes of the assessment of damages, is to be the date of the judgment made on 18 March 2005. I directed for valuation reports to be filed by the respective parties.

**[4]** Only the plaintiff filed a valuation report. The defendant did not. The report was prepared by a qualified valuer, Mr. Ooi Yew Hock of Knight Frank Ooi & Zaharin Sdn Bhd. The defence was accorded the opportunity to cross-examine Mr. Ooi on his valuation report.

**[5]** Mr. Ooi in his report and in arriving at the opinion had regard to the following:

(a) Lot 127 was valued on the assumption of it having been delivered in accordance with the defendant's obligations under the sale and purchaser agreement, that is to say, with the necessary basic infrastructure for the development project serving lot 127.

(b) The judgment date of 18 March (on the issue of liability) was used as the date of valuation.

(c) The location of lot 127 together with its surroundings was properly identified by the necessary location plans.

(d) The description of lot 127 and what the defendant was obliged to deliver according to the principal and supplementary sale and purchase agreements were properly identified and taken into account.

(e) The various and other necessary searches and investigations were also conducted.

**[6]** The accuracy of all these matters was not challenged by the defendant.

**[7]** In determining what would have been the market value of lot 127 on 18 March 2005, Mr. Ooi adopted the comparison method. He used and applied four comparables. He made the necessary adjustments (downwards or upwards adjustments, as the case may be) taking into account pertinent factors such as time, size, location, and the legal nature of the ownership (for example freehold or leasehold). Mr. Ooi then arrived at the market value of RM20 per square foot and hence his opinion of RM400,000 as the value of lot 127 as at 18 March 2005.

**[8]** As the purchase price of lot 127 was RM150,372.00, I made a finding that the loss suffered by the plaintiff is the difference between the market value of the property as at 18 March 2005 (that is, RM400,000) and the purchase price (that is RM150,372), and the difference is RM249,628. I therefore made an order that the defendant do pay the plaintiff the sum of RM249,628 as damages/compensation.

**[9]** It is to be recalled that the plaintiff pursuant to the sale and purchase agreement had paid the defendant a sum of RM75,186 as part payment towards the purchase price. The question now arises as to whether she is also entitled to a refund of this sum, considering that she has, pursuant to the present assessment of damages, already been awarded a sum of RM249,628. I am of the view that she is also entitled to a refund of this amount of RM75,186. The rationale is this: the plaintiffs paid RM75,186 for something they never got, and hence must

be refunded this amount. In so ruling, I am guided by the case of *Central Malaysia Development Co. Ltd. v. Chin Pak Chin* [1967] 1 LNS 15. In this case, Ajaib Singh J (as he then was) said (at pp. 177-178):

> In the result the plaintiffs are entitled to recover the sum of $60,000 which they have paid as deposit on the date of the agreement together with a reasonable rate of interest, which I fix at 6% per annum, and they are entitled to recover by way of damages for loss of bargain a sum of $56,725. Accordingly there will be judgment for the plaintiffs for $116,725 with interest on $60,000 at 6% per annum from 1st July, 1964 to date and on the aggregate sum of 6% per annum from today to date of realisation.

**[10]** Thus the total amount of damages awarded to the plaintiff was RM249,628 plus RM75,186, and this amounts to RM324,814.

**[11]** I awarded interest of 8% per annum from the date of judgment on liability (that is, 18 March 2005) until full payment on the sum of RM324,814.

**[12]** I also awarded costs to the plaintiff in respect of the assessment of damages proceedings.

**[13]** Finally, there is one matter. Now, Mr. Ooi, the plaintiff's valuer, did not personally inspect lot 127 on the date stated in the valuation report as the 'date of inspection', that is, 4 October 2005. However, he did subsequently inspect the lot on the morning of 7 June 2006 (the second day of the assessment trial). The learned counsel for the defendant, Encik Dennis Appaduray, submitted that by reason of this failure to inspect by Mr. Ooi himself, his report and opinion must be rejected by the court.

**[14]** Now, although Encik Ooi did not inspect lot 127, he, however, gave evidence that he was familiar with the location and surroundings of lot 127; that he inspected the lot in the morning of 7 June 2006; and that, after his personal inspection on 7 June 2006 to update himself on the current situation, he stood by his analysis as contained in his report. Mr. Ooi, in his evidence, appears to imply that the inspection on 4 October 2005 was done by his assistant, one Ken Chan who has a degree in valuation but was not a registered valuer; and that photographs in the valuation report were taken by Ken Chan at the time when the inspection was done by the latter. In this regard, I shall produce the relevant portion of the evidence of Mr. Ooi given during cross-examination:

Q: Did you personally do this inspection? A

A: No.

Q: If you did not personally do this inspection, how are you able to describe the position of the said property, the location, etc.? B

A: I am familiar with the location and the surroundings; and the report was prepared with the help of a valuer in my firm.

Q: Who would that be?

A: Mr. Ken Chan. C

Q: So your report is based on a data and information by another party to you?

A: A part of it yes. D

Q: What were the date and information in this report that were obtained or supplied by Ken Chan?

A: Data like property description, planning, search and sales date.

**[15]** In this regard, Encik Conrad Young, the learned counsel for the plaintiff, referred to the 'Manual of Valuation Standards' of the Board of Valuers, Appraisers and Estate Agents, Malaysia, where at para. 6.2.2 the manual states: E

> Where the Valuer does not himself inspect the property, he must be familiar with the locality, the type of property and the relevant market condition to enable him to verify his Designated Assistant's inspection report and findings. (The person inspecting the property must sign and date his inspection report). F

**[16]** In the present case, however, there is no inspection report signed and dated by the said Ken Chan, that was tendered. Thus the requirement: G

> (The person inspecting the property must sign and date his inspection report).

has not been met. H

**[17]** Be that as it may, it is my finding that, although Mr. Ooi did not inspect the property on the 'inspection date' of 4 October 2005, nevertheless he was familiar with the surroundings of the property in question and he had subsequently inspected the property on 7 June 2006 I

A and stood by his report. In the light of these facts and also of the fact that the lot is merely a vacant bungalow lot with no building on it, and considering that the defendant did not tender any expert opinion on the value of lot 127, I am of the view that the opinion of Mr. Ooi ought to be accepted by the court.

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